ATTORNEY FOR APPELLANT:

ANN M. SUTTON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KERRY HUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0703-CR-264
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Nancy Broyles, Commissioner
Cause No. 49G05-0610-FC-205340

December 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kerry Huff appeals his convictions of burglary and attempted theft. Huff argues the trial court abused its discretion by denying his motion for a mistrial, his convictions put him in jeopardy twice for the same offense, and the evidence was insufficient to convict him of burglary. Finding he cannot be convicted of both burglary and attempted theft on the evidence presented at his trial, we vacate in part and affirm in part.

FACTS AND PROCEDURAL HISTORY

On October 24, 2006, Huff and his stepson, Eric Harris, broke into an empty rental home at 1417 Shepard Street to steal copper pipes. They entered through a window, which they pried open with a screwdriver. They found copper pipes in the kitchen and started "breaking the copper off the floors." (Tr. at 57.) Huff then went outside to check the crawl space for pipes.

In the meantime, a neighbor called the police and reported a possible burglary in progress. Officer John Weidner responded to the call. He saw Huff exit the rental home. When Huff saw Officer Weidner, he ran back inside. Eventually, Huff and Harris came out the front door and surrendered to the police. Harris testified at trial that Huff told him to say they were homeless.

After Huff and Harris were arrested, police officers found copper pipes lying in the kitchen and bathroom and holes in the drywall where pipes had been removed. They found a screwdriver, but no other tools.

Huff was charged with burglary, a Class C felony, and attempted theft, a class D felony. At Huff's trial, a juror asked Officer Weidner whether anyone went to Huff's home to look for copper pipes. Officer Weidner replied, "They said they were

homeless." (*Id*. at 29.) Huff objected on the ground the answer was non-responsive. The trial court sustained the objection and instructed the jury not to consider the statement. Huff then moved for a mistrial on the ground he had not been given *Miranda* warnings when he made that statement. The trial court denied the motion, finding no harm. Huff was found guilty as charged.

DISCUSSION AND DECISION

1. Denial of Motion for Mistrial

Huff argues the trial court abused its discretion by denying his motion for a mistrial. "The determination of whether to grant a mistrial is within the trial court's discretion, and to prevail on appeal, the defendant must show that he was so prejudiced that he was placed in a position of grave peril to which he should not have been subjected." *Olson v. State*, 563 N.E.2d 565, 571 (Ind. 1990). Peril is measured by the probable persuasive effect on the jury. *Gregory v. State*, 540 N.E.2d 585, 589 (Ind. 1989). "A mistrial is an extreme remedy warranted only when no other curative measure, such as an admonishment, will rectify the situation. Reversal is seldom required when the trial court has admonished the jury to disregard some statement or conduct." *Simmons v. State*, 760 N.E.2d 1154, 1162 (Ind. Ct. App. 2002) (citations omitted). The appellant has the burden of demonstrating a mistrial is the only adequate remedy. *Gregory*, 540 N.E.2d at 589.

During his opening statement, defense counsel argued Huff did not enter the house with intent to commit a felony:

> Mr. Huff lived down the street and Eric Harris is his stepson. They … decided one night that they were going to go and wander around the neighborhood, mess around in their neighborhood. They decided to get mischievous and nosey. . . . [T]hey went into a house they thought was vacant or abandoned. . . .

(Tr. at 8.) Huff argues the subsequent testimony of Officer Weidner that Huff said he was homeless prejudiced him because it demonstrated he lied to the police and contradicted his defense.

The probable persuasive effect of this testimony on the jury was slight. The jury was admonished to disregard Officer Weidner's testimony, and we presume the jury followed that instruction. *See Francis v. State*, 758 N.E.2d 528, 532 (Ind. 2001). Furthermore, Harris testified without objection that Huff told him to say they were homeless. To the extent Officer Weidner's testimony bolstered that of Harris, it was not on a material factual issue. Under the circumstances, the admonition was a sufficient remedy, and the trial court did not abuse its discretion by denying Huff's motion for a mistrial.

2. Double Jeopardy

Huff claims his convictions of attempted theft and burglary violate Article 1, Section 14 of the Indiana Constitution, which provides, "No person shall be put in jeopardy twice for the same offense." Specifically, he argues his convictions violate the actual evidence test established in *Richardson v. State*:

> [T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

717 N.E.2d 32, 49 (Ind. 1999) (emphases in original).

> For there to be a double jeopardy violation it is not required that the evidentiary facts establishing all of the elements of one challenged offense also establish all of the essential elements of a second challenged offense. . . . If the evidentiary facts establishing any one or more elements of one of the challenged offenses establishes the essential elements of the second challenged offense, double jeopardy considerations prohibit multiple convictions.

Alexander v. State, 772 N.E.2d 476, 478 (Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 700 (Ind. 2002).

Huff bears the burden of proof:

> To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Richardson, 717 N.E.2d at 53.

Burglary is breaking and entering "the building or structure of another person, with intent to commit a felony in it." Ind. Code § 35-43-2-1. Attempted theft is taking a substantial step toward exerting "unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use." Ind. Code §§ 35-41-5-1; 35-43-4-2.

Huff argues there was a reasonable possibility the actual evidence used to prove attempted theft was also used to prove intent to commit a felony in the home. *See Richardson*, 717 N.E.2d at 55 (Sullivan, J., concurring) (noting Richardson had been convicted of a crime "which consists of the very same act as an element of another crime

for which the defendant has been convicted and punished").

The State argues the burglary was complete when Huff broke into the house, and the attempted theft occurred when he tried to remove the pipe. However, this argument assumes the State presented proof of Huff's intent to commit a felony aside from the fact he subsequently attempted to remove copper pipes from the home. Having reviewed the record, we find there was a reasonable possibility the jury used the fact of the attempted theft to find Huff had intent to commit a felony.

At the trial, Harris was asked how he and Huff came to be inside the home. He replied, "Well we were at my mother's house and we decided to go to 1417 Shepard, to get copper, I guess." (Tr. at 56.) Huff objected on the ground Harris did not have personal knowledge of what Huff had decided. The trial court sustained the objection and ordered the testimony to be stricken. No further testimony was elicited explicitly indicating Huff's intent when entering 1417 Shepard Street.

Intent may be inferred from the defendant's subsequent conduct inside the premises. *Mull v. State*, 770 N.E.2d 308, 313 (Ind. 2002). In this case, the subsequent conduct was an attempt to remove copper pipes from the home. However, the evidence of his attempt to remove the copper pipes was also the basis for his conviction of attempted theft. *Cf. Vestal v. State*, 773 N.E.2d 805, 807 (Ind. 2002) (upholding convictions of burglary and a completed theft, because evidence of unauthorized control was not an element of burglary and defendant's statements beforehand provided independent evidence of intent to commit a felony). The only evidence of Huff's intent when entering the residence, apart from his attempted theft, was stricken from the record.

Therefore, there is a reasonable possibility the evidence establishing attempted theft was also used to establish the intent to commit a felony element of burglary, and the convictions cannot both stand. Accordingly, we vacate Huff's conviction of attempted theft.

3. Sufficiency of the Evidence

Huff argues the evidence was insufficient to convict him of burglary. When reviewing the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Dinger v. State*, 540 N.E.2d 39, 39 (Ind. 1999). We consider the evidence most favorable to the verdict, along with all reasonable inferences, to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id*. at 39-40.

Huff conceded he was not in the home with permission. Furthermore, his subsequent activity in the home demonstrates he entered with intent to commit a felony. Huff argues there was no evidence he intended or attempted to steal pipes from the home. He notes pipes had been removed from the walls, but the only tool he had with him was a screwdriver. He was not seen with drywall dust on his clothes and was in the home for only about fifteen minutes. While these facts may suggest someone else began the work of removing the pipes, they do not contradict Harris' testimony about their conduct in the home.

The fact that Huff broke into a home and then tried to remove pipes demonstrates he entered with intent to commit a felony. Although the evidence of Huff's attempt to remove copper pipes from the home cannot support his convictions of both attempted

theft and burglary, it can be used to sustain either one by itself. Therefore, we affirm his conviction of burglary.

Vacated in part and affirmed in part.

CRONE, J., and DARDEN, J., concur.